No. 72812-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S OPENING BRIEF

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2. Mr. Williams did not knowingly, intelligently, or voluntarily waive his right to appointed counsel.

3. The trial court erred in denying the defense motion to sever the charges as to each complainant, M.W. and E.W., which involved counts that were wholly separate in time.

4. The trial court violated Mr. Williams' Fourteenth Amendment rights when it denied his counsel's request to participate in the court's *in camera* review of the complainant's Blaine school records.

5. The trial court violated Mr. Williams' Due Process right and his Sixth Amendment rights when it imposed a "two strikes" sentence of Life Without Possibility of Parole.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A request to proceed pro se must come in the form of an unequivocal demand for actual self-representation. Approximately ten days before trial, Mr. Williams asked to represent himself as a means of seeking a new appointed lawyer, a request he had also made some months previously.

The trial court conducted a colloquy; however, it all but promised Mr. Williams that if he represented himself, he would have his knowledgeable, current counsel as standby counsel. Mr. Williams stated that he thought he could represent himself -- if he had stand-by counsel. The court also told Mr. Williams – before he waived counsel -- that he could change his mind later, and have his lawyer re-appointed.

Early in trial, following examination of several witnesses, Mr. Williams suffered a headache. The trial court granted a medical continuance and told Mr. Williams that he seemed to be struggling with the task of self-representation, and again urged him to consider re-appointment of Mr. Fryer. After the weekend, Mr. Williams then accepted Fryer as counsel. Ultimately, the trial court's concern for the defendant's interests and for his right to a fair trial, under these facts and circumstances, had the unfortunate effect of allowing Mr. Williams to choose to 'experiment' with self-representation, which he did, until such time as it appeared he was not capable of continuing effectively.

Did Mr. Williams unequivocally demand to represent himself, where he did not ask to actually represent himself, and where his request to proceed pro se was not simply coupled with

a previous, unsuccessful request for a new lawyer, but instead was expressly stated to be a *means* of obtaining a new laywer?

2. Was Mr. Williams' waiver of his right to counsel knowing, voluntary and intelligent, where the trial court's assurances of a case-knowledgeable standby counsel, and the court's statement that he had the option and ability to *change his mind later*, resulted in Williams not making his decision with his "eyes wide open," i.e., truly made aware of the risks and legal disadvantages of foregoing representation by an attorney, and the magnitude of that undertaking?

3. Considering the lack of a temporal or factual relationship between the allegations as to M.W. and the allegations as to E.W., and the trial court's failure to perform a substantive, on the record analysis of cross-admissibility, did the trial court abuse its discretion in denying Mr. Williams' motion to sever the counts?

At trial, in closing argument, the prosecutor contended to the jury that although the two complainants had difficulty remembering and had made inconsistent statements over time, their accounts corroborated each other. Did Mr. Williams suffer specific prejudice?

4. Mr. Williams established that the two complainants' Blaine school records likely contained information material to the defense case, including impeachment matters, and the complexities of the possible defenses, and the complainant's changing statements over time, required that the school records be examined with an "advocate's eye." Did the trial court violate Mr. Williams' Due Process rights when it declined to allow defense counsel to participate in the court's *in camera* review of the school records, where the defense had also suggested additional protective orders, including only allowing Williams' counsel, and not the defendant, to participate?

5. Did the trial court violate Mr. Williams' Due Process right and his Sixth Amendment rights when it imposed a "two strikes" sentence of Life Without Possibility of Parole?

C. STATEMENT OF THE CASE

Frederick Williams was tried a second time in October, 2014 in Whatcom County Superior Court on charges of child molestation and rape of a child, allegedly committed against his niece M.W., and his niece E.W, in locations in Whatcom County where he was living near his brother's family. The counts as to M.W. had a charging period of 2006 to 2008, while the bulk of

the charges were as to E.W., with a charging period of 1999 to 2003. CP 5, 13, 188-91 (amended informations).[1]

The trial court denied Mr. Williams' CrR 4.4(b) motion to sever the counts as to E.W. from the counts as to M.W. 4/8/14RP 111. The trial court also denied Mr. Williams' motion that the parties' attorneys be permitted to participate in the court's *in camera* review of the complainants' Blaine school records from when they were children, and at the time of the alleged offenses, which had been obtained by the court's issuance of a subpoena *duces tecum* sought by the defense. 5/6/14RP at 118-22.

Prior to trial, on multiple occasions including in January and February of 2014, and again in April, Mr. Williams expressed upset with his appointed counsel Tom Fryer, and made motions to be appointed new counsel and to proceed pro se. On January 23, 2014, he told the trial court that "the whole idea of doing this is to try to mostly get counsel other than Mr.

[1] Mr. Williams' first trial, held in 2011, resulted in convictions on similar charges, but the judgment was reversed when this Court of Appeals, in an unpublished decision, concluded that the defendant's 1991 sex offense conviction should not have been admitted under RCW 10.58.090 per State v. Gresham, 173 Wn. 2d 405, 413, 269 P.3d 207, 210 (2012), and that the trial evidence was not strong enough to overcome the error of admitting the conviction without an ER 404(b) limiting instruction. State v. Williams, 172 Wn. App. 1027 (2012). The State did not attempt to introduce the 1991 conviction at the second trial.

Fryer." 1/23/14RP at 16.

On October 9, Mr. Fryer presented Mr. Williams and announced to the court that his client was moving "to proceed pro se with me [Mr. Fryer] as standby counsel." 10/9/14RP at 136. Mr. Fryer stated that Mr. Williams was not moving "to proceed straight up pro se." 10/9/14RP at 136.

During the court's Faretta colloquy, when asked "why" he wanted to represent himself, Mr. Williams again complained about his lawyer, and stated he wanted another lawyer if the court denied his pro se motion. 10/9/14RP at 142-46. When the court asked him if he still wanted to represent himself, considering the penalty, Williams said, "If I have standby counsel, I think I can do it, Your Honor." 10/9/14RP at 146.

The trial court agreed with Mr. Fryer to delay any pro se status or have it be on hold when Mr. Fryer could present argument on pending motions he had briefed, while Mr. Williams himself would handle jury selection. 10/9/14RP at 146, 148, 150. Then, the court told Mr. Williams

> All right. Well, I hope that you change your mind but you have the constitutional right to proceed as your own lawyer.

10/9/14RP at 151-52. The court stated it would direct Mr. Fryer

to be standby counsel, and then ordered that it was finding Mr. Williams had knowingly and voluntarily waived his right to an attorney, although the court again told Mr. Williams it hoped he would change his mind. 10/9/14RP at 152.

During the subsequent pre-trial hearings, and trial with examination of witnesses, the court, several times, encouraged Mr. Williams to take back his pro se status. See, e.g., 10/9/14RP at 152; 10/21/14RP at 165-66. After several days of trial, when Mr. Williams became sick and stated he could not continue, the court again suggested this was the time to have Mr. Fryer re-appointed. 10/23/14RP at 315, 317, 324. Mr. Williams accepted counsel the next day. 10/24/14RP at 3-5. He was convicted, and he appeals. CP 24-41, 256-74.

D. ARGUMENT

(1). MR. WILLIAMS DID NOT UNEQUIVOCALLY REQUEST TO REPRESENT HIMSELF, NOR DID HE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE COUNSEL.

a. Standard of Review. On appellate challenge, a trial court's decision granting a defendant's request for self-representation is reviewed for abuse of discretion. State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007). A

decision on a defendant's request for self-representation will be reversed if the decision relies on unsupported facts, or applies an incorrect legal standard. State v. Madsen, 168 Wn. 2d 496, 504, 229 P.3d 714, 718-19 (2010); (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

b. The presumption against finding a waiver of the right counsel. The Sixth Amendment and art. I, § 22 of the Washington Constitution provide that criminal defendants have the right to be represented by a lawyer. Mempa v. Rhay, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733 (1963); U.S. Const. amend. 6; U.S. Const. amend. 14. At the same time, a defendant may waive that important right, and represent himself. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

However, because of the fundamental importance of the right to counsel, and the perceived detrimental result of relinquishing that right, trial courts are cautioned to "indulge in every reasonable presumption" against finding a defendant has validly waived his right to counsel. In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999); Brewer v. Williams, 430

U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)).

(i) Unequivocal. The request to proceed pro se must be "unequivocal." State v. Madsen, 168 Wn. 2d at 506-07; see also State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). The unequivocal requirement is necessary to limit baseless constitutional challenges on appeal. State v. Imus, 37 Wn. App. 170, 179–80, 679 P.2d 376 (1984), review denied, 101 Wn.2d 1016 (1984) (requirement of unequivocal demand permits trial courts to deny equivocal requests without fear of reversal).

In Madsen, the Supreme Court held that the trial court abused its discretion when it denied the defendant's request to proceed pro se as "equivocal" by virtue of the fact that it followed shortly after an unsuccessful request for a new attorney. State v. Madsen, 168 Wn. 2d at 506-07.

The Court went on to explain, in that context, the bases for denying a request for self-representation. The Court indicated that denying pro se status should be based on a fact supporting the reason that the presumption against waiver had not been rebutted:

> The grounds that allow a court to deny a defendant the right to self-representation are limited to a

> finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in Turay does not go so far as to eliminate the need for any basis for denying a motion for pro se status.

State v. Madsen, 168 Wn. 2d at 504-05. Iin this case, the multiple facts in the record warranted *only* a denial of pro se status.

(ii) Knowing voluntary and intelligent waiver. If a demand is unequivocal, the highly consequential waiver of the right to counsel is still valid only if it is knowing, voluntary, and intelligent. In re Personal Restraint of Rhome, 172 Wn.2d 654, 663, 260 P.3d 874 (2011); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); City of Bellevue v. Acrey, 103 Wn.2d 203, 208–09, 691 P.2d 957 (1984).

A valid waiver of the right to counsel under this standard requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that " 'he knows what he is doing and his choice is made with eyes open.' " Acrey, 103 Wn.2d at 209 (quoting Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)); United States v. Balough, 820 F.2d 1485, 1487 (9th

Cir.1987) (same).

Importantly, one of the risks of self-representation is that there is no right to standby counsel. State v. Silva, 107 Wn. App. 605, 626–27, 27 P.3d 663 (2001) (there is no constitutional right to standby counsel and no Sixth Amendment right to hybrid representation wherein a defendant serves as co-counsel with his attorney). Moreover, once a defendant has waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. Silva, 107 Wn. App. at 626–27.

c. The question of unequivocality, and a knowing waiver, is based on the record as a whole. The question whether the defendant's request to represent himself is unequivocal, and knowing and voluntary, is assessed in light of the entire record. State v. Modica, 136 Wn. App. 434, 441, 149 P.2d 446 (2006) (the demand must be unequivocal in the context of the record as a whole) (citing State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995), aff'd, 164 Wn.2d 83,186 P.3d 1062 (2008)).

d. The defendant's request was not unequivocal, and he was not advised of the risks and disadvantages of self-representation. Applying the requirements of an unequivocal

demand, the Supreme Court has stated:

> While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, Johnstone v. Kelly, 741 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal.

State v. Stenson, 132 Wn. 2d 668, 739-42, 940 P.2d 1239, 1275-76 (1997) (affirming trial court's denial of pro se status for lack of unequivocal request where defendant was denied new counsel and then said, "I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this."). The Stenson Court continued, setting out the facts that showed the appellant's pro se request in that case was equivocal:

> The request to represent oneself may be stated in the alternative of a request for new counsel. However, in such a situation where the request is conditional, the request must be unequivocal. In this case, the requests were both conditional and equivocal. The request to be pro se must be unequivocal in the context of the record as a whole. Luvene, 127 Wn.2d at 698–99, 903 P.2d 960. Here, almost all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. He explained he had contacted a number of attorneys and had asked for permission to talk with his newly-selected counsel.

> He told the trial court he did not want to represent himself but that the court and his counsel had forced him to do that. More importantly, the Defendant did not refute the trial court's final conclusion that he "really [did] not want to proceed without counsel."

State v. Stenson, 132 Wn. 2d at 741-42.

Looking at the entire record, but focusing particularly on the hearing of October 9, the facts of Mr. Williams' request to proceed pro se demonstrated neither a conditional request – Mr. Williams specifically stated that he wanted a new lawyer – and only equivocality. Nothing refutes the fact that Mr. Williams' request was to proceed pro se *with standby counsel*, and not to proceed "straight up" pro se.

(i) January 23. On January 23, 2014, during litigation regarding the subpoena of school records, Mr. Williams noted that a new motion he wanted heard was his request to the court to provide a new lawyer, or allow him self-representation. 1/23/14RP at 16. Mr. Williams revealed the true purpose of his motion, when he stated,

> Your honor, the whole idea of doing this is to try to mostly get counsel other than Fryer.

1/23/14RP at 14-16; Supp. CP ___, Sub # 213. Mr. Williams then began speaking about his belief that the State would simply transfer the case from Mr. Fryer to Andrew Subin, a lawyer

Williams had been speaking with, and Subin would receive the State's payment. 1/23/14RP at 17.

At that point, Mr. Williams was told of the certain likelihood that representing himself would come with standby counsel. When Tom Fryer noted that any order allowing Mr. Williams to proceed pro se should also give him Mr. Fryer as standby counsel, the court cautioned that appointing standby counsel is not something that is universally done, "but very frequently done." 1/23/14RP at 19. The court set a hearing, and stated, "I can think of pro se they are most frequently given standby counsel." 1/23/14RP at 19.

(*ii) January 27*. The trial court denied the motion. The court, seeking to clarify what Mr. Williams was requesting, asked if it was accurate that he wanted to represent himself. 1/27/14RP at 26. Mr. Williams responded:

> Partly and partly not. To be honest, to be completely honest, Your Honor, I was hoping that, um, if, you know, you get [lawyer] Subin in, in some way, the same way I got Mr. Fryer, I didn't realize that the court can't do that but I mean. I know my case, but I am not –

1/27/14RP at 26. Mr. Williams asserted that his dissatisfactions with Mr. Fryer were legitimate, and made clear that he did not want Mr. Fryer as his lawyer, but instead wanted Mr. Subin, but

indicated that if he could not obtain that result, "if I have to take, either go pro se or take a public defender, then I will." 1/27/14RP at 29-32. He reiterated to the court that "if there is anything that you can do to help switch it over to [lawyer] Subin, I mean, that's what I would prefer." 1/27/14RP at 32. The court denied the motion, stating that Mr. Williams was not really asking to represent himself. 1/27/14RP at 32-33.

(iii) October 9. Thereafter between January 27, 2014, and October 9, Mr. Williams at various times stated his upset with counsel or the process generally. See, e.g., 4/8/14RP at 109. Then, on, October 9, Mr. Fryer indicated to the court that Mr. Williams was again moving

> [t]o the effect that, he would like to proceed, I don't think he would like to proceed straight up pro se, but I think he would like to proceed pro se with me acting in a standby capacity.

(Emphasis added.) 10/9/14RP at 136. When the court inquired, Mr. Williams confirmed that he was seeking "to go pro se with standby counsel." 10/9/14RP at 136. At that point, although the court told Mr. Williams the legal authorities indicated no right to standby counsel, the court stated that the courts are generally in favor of appointing standby counsel. 10/9/14RP at 137. Additionally, the court confirmed that not only would Mr. Williams

likely be given standby counsel if he went pro se, but that it would be Mr. Fryer.

> THE COURT … In this case we already have quite capable counsel who is very familiar with the case who I assume was willing to act as standby counsel?
> MR. FRYER: I am, Judge.

10/9/14RP at 136-7. The court, throughout the colloquy that followed, also told Mr. Williams he could change his mind, and have standby counsel take over full representation. 10/9/14RP at 137.

The court next proceeded to a colloquy under Faretta regarding Williams' knowledge of the law and court rules, which he did not have. 10/9/14RP at 137. When the court asked Mr. Williams why he wanted to represent himself, Mr. Williams complained that Mr. Fryer was not "representing me in my best interest" and returned to his requests for substitute counsel. 10/9/14RP at 141-44.

When the court then asked if, in light of the penalty that he might suffer, it was still Mr. Williams' desire to represent himself, he replied,

> If I have standby counsel, I think I can do it, Your Honor.

10/9/14RP at 146. Before ruling, the court said it agreed with counsel Fryer that the court would essentially place the pro se status on hold or delay it going "into affect," so Fryer could provide oral argument for various legal motions he had drafted. 10/9/14RP at 146-50. Regarding other tasks such as the motions in limine, the court confirmed with Mr. Fryer, stating, "All right. And your current client would be conducting those?" 10/9/14RP at 148-49. Then, the court told Mr. Williams

> All right. Well, I hope that you change your mind but you have the constitutional right to proceed as your own lawyer.

(Emphasis added.) 10/9/14RP at 151-52. The whole record fails to show a valid waiver.[2]

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[2] After the Faretta waiver, even as Mr. Williams was purportedly acting pro se, counsel Tom Fryer continued to act. On October 20, Mr. Fryer made arguments regarding the jury questionnaire, and discussed evidentiary issues regarding the prior trial. 10/20/14RP at 154-56. On October 21, the jury was selected. 10/21/14RP at 157; Supp. CP ___, Sub # 281 *et seq*. (minutes of October 21, 2014). The trial court responded to concerns raised by the prosecutor by commenting, "I am not sure how he is acting right now. He is acting more like counsel." 10/21/14RP at 160. On October 22, 2014, opening statements were delivered and witnesses Officer John Landis, Theresa Williams, and Joan Gaasland-Smith were examined, and cross-examined by the defendant Mr. Williams. 10/22/14RP at 200 to 303; Supp. CP ___, Sub # 281 *et seq*. (minutes of October 22, 2014).

On the morning of October 23, Mr. Williams announced that he had a pounding headache, and asked for a continuance. 10/23/14RP at 304-05. After a medical inquiry, the court told Williams he had been struggling with representing himself, asking questions, and making objections and the like, and asked him to "consider carefully" what was at stake with his self-representation. 10/23/14RP at 315-17. The court ordered a continuance to Monday, and upon dismissing the parties the court stated

(v) A prospective pro se defendant's request to represent himself "with standby counsel" is not unequivocal, and telling the defendant before the waiver that he will indeed have his current lawyer as standby counsel, and that he can change his mind later and obtain counsel back, does not inform the defendant of the disadvantages of self-representation.

An accused's desire to waive his Sixth Amendment right to a lawyer at trial but retain counsel as his standby lawyer, should not be granted, and in this case, the circumstances resulted in this defendant effectively being allowed to 'experiment' with self-representation.

Mr. Williams' request was not unequivocal in these circumstances. Although the law holds that the fact of a pro se request coming after the denial of a new counsel motion, is not by that procedural fact a determinant as a matter of law that the defendant's request to represent himself is "equivocal," State v. Madsen, supra, in this case, Mr. Williams stated on the record that the reason he was asking to represent himself was part of his ongoing effort to obtain a *new lawyer*. His request was not

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> I hope that, um, also that maybe later today you and Mr. Fryer can get together and talk about some of the issues that need to be talked about, and I won't say another word.

10/23/14RP at 324. Mr. Williams appeared in court the next court day and accepted Mr. Fryer back, as counsel – an option he had been told he possessed since before he waived his right to counsel. 10/24/14RP at 3-5.

unequivocal – except that the defendant's confessed purpose was to try to "switch it over to [lawyer] Subin" on January 27. 1/27/14RP at 32. And on October 9, when asked why he wanted to represent himself, Williams responded by complaining about Mr. Fryer and returning to his requests for *substitute counsel*. 10/9/14RP at 141-44.

Further, Mr. Williams' request to proceed pro se with standby counsel is not in itself unequivocal, even without considering the whole record. This language is not a request to take on the serious burdens of self-representation, which, in law, include no right to assistance, even limited clerical or bureaucratic assistance – much less the standby assistance of the lawyer deeply familiar with the case.

Even if, *arguendo*, Mr. Williams could be said to have made a conditional request to represent himself – one sought in the alternative to a new lawyer -- the October 9 waiver request came in the context of that hearing and the entire record. Having been informed that he would receive standby counsel in the form of Mr. Fryer, and having been told repeatedly that he possessed the option of having Mr. Fryer re-appointed if he later no longer wished to represent himself, it was in this context that

Mr. Williams said he did "think he could do it." This is not an unequivocal request for actual self-representation.

This was also not a knowing, voluntary, or intelligent waiver. It is a disadvantage of self-representation that a defendant is not entitled to standby counsel, see also State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987), and it is a further disadvantage that once the pro se right is invoked, there is no right to re-appointment of counsel – especially for a request made mid-trial. Silva, 107 Wn. App. at 626–27.

> Once an unequivocal waiver of counsel has been made, the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court.

(Emphasis added.) State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991); see also State v. Afeworki, No. 70762-1-I, 2015 WL 4724827, at *4-5, *12 (Wash. Ct. App. Div. 1, Aug. 10, 2015) (court properly ruled defendant waived counsel by his conduct in the courtroom; defendant was warned of the disadvantages of self-representation including that he would not be entitled to standby counsel) (and court properly denied defendant's subsequent request for counsel, stating, "[b]ut the constitution does not allow you to, once you are representing

yourself, once you have made that request and you begin representing yourself, to change your mind in the middle of trial.").

The trial court must apprise the defendant of the disadvantages of self-representation. United States v. Balough, 820 F.2d at 1489. This requires that the court convey to the defendant a sense of the "magnitude of the undertaking." (Emphasis added.) State v. Nordstrom, 89 Wn. App. 737, 744 n. 12, 950 P.2d 946 (1997) (quoting Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir.1976)).

On this record, the trial court unfortunately did the opposite of conveying the magnitude of the task. Ultimately, granting Mr. Williams' request for self-representation was an abuse of discretion where he requested to proceed pro se "with standby counsel," where he said he thought he could represent himself "if" he had standby counsel, where he was advised he could in fact have knowledgeable trial counsel as standby counsel, and where he was told – before he waived – that he could change his mind when he wished.

The trial court's statements to Mr. Williams reflected its expressly stated, real concern that Williams not make the

mistake of representing himself in this case. But as a result of the circumstances of the whole record, this defendant never sought, and never accepted, the actual burden of self-representation – going it alone without standby counsel, and relinquishing any option to simply change his mind as a matter of right and have a lawyer re-appointed. The waiver was invalid.

e. Reversal and remand is required. Improper acceptance of a defendant's waiver request constitutes reversible error. State v. Madsen, 168 Wn.2d at 503; see also United States v. Arlt, 41 F.3d 516, 521 (9th Cir.1994). The right to counsel is so fundamental to the right to a fair trial that any improperly-secured deprivation of it cannot be treated as harmless error. State v. Silva, 108 Wn. App. at 542.

(2). THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. WILLIAMS' MOTION TO SEVER THE COUNTS.

a. Mr. Williams properly made and renewed a motion to sever counts under CrR 4.4. The defendant was charged with sexual abuse counts against the two complainants. At the time of his motion to sever (later renewed), multiple child molestation and rape counts were alleged with regard to complainant E.W. with a charging period of February 1999

through February 2003; and similar counts were charged as to M.W., with a charging period commencing almost three years later, September, 2006 through August, 2008. CP 54-55.

Mr. Williams' central argument was that, despite the fact that the allegations made by one child were "fundamentally irrelevant" as to the veracity of the allegations made by the other, there was a great likelihood that the jury would aggregate the totality of the evidence offered by the plaintiff [State]." CP 55. Mr. Williams also argued that he had defenses to each complainant's accusations which would not both be rebutted by the same State's evidence. CP 55.

The prosecutor set out an offer of proof in response to the severance motion. CP 77; 4/8/14RP at 109. The State responded that the charged counts relating to E.W. and M.W. were equally strong and easily compartmentalized. CP 94.

(i) Ruling of denial. The trial court, following argument, denied the motion. The court specifically stated that it was ruling in accordance with the arguments in the State's briefing response to the defense motion to sever. 4/8/14RP at 111; see CP 77, 94.

(ii) Renewal. The motion to sever was later renewed, and the trial court denied the renewed motion. The court denied Mr. Williams' request that the court substantively address the ER 404(b) issues presented by the severance analysis. 10/21/14RP at 168-69, 180.[3]

b. <u>The trial court abused its discretion</u>. The trial court abused its discretion. CrR 4.4(b) requires that the trial court "shall grant severance of offenses whenever before trial or during trial . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." A denial of a CrR 4.4(b) motion to sever multiple charges is reviewed for a manifest abuse of discretion. <u>State v. Bythrow</u>, 114 Wn.2d 713, 790 P.2d 154 (1990). Discretion is abused where the trial court fails to rule or takes a legally

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[3] The criminal rules require that the defendant renew a motion to sever before or at the close of the evidence.

> **Timeliness of motion - Waiver.** (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time. (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion."

CrR 4.4(a); <u>see State v. Bryant</u>, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (defendant must renew the motion to sever).

untenable position in its ruling. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Importantly, the focus in a severance motion is the prejudice a defendant like Mr. Williams may suffer at trial, even if a prior joinder of the counts would otherwise be deemed proper based on the less strict requirements for initial joining of counts. State v. Gatalksi, 40 Wn. App. 601, 606, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985); see RCW 10.37.060 (requiring simply that the defendant be charged with acts of the same class of crimes or offenses, with some connection); see State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968) (the ultimate result of joinder must not be utilized in such a way as to prejudice a defendant).

c. Severance of the E.W. and M.W. counts was required where the defendant would suffer unfair prejudice by trying joined counts together. Under the Court Rule, criminal offenses should be severed for trial if doing so will promote a fairer determination of guilt or innocence. Bythrow, 114 Wn. 2d at 717; CrR 4.4(b). The Washington Courts have always held that the primary concern in determining severance must be whether the jury could be reasonably expected to keep

the testimony and evidence of each offense separate. Gatalski, 40 Wn. App. at 607.

This important question has to do with the risk that the amount of evidence on the total counts may accumulate and prejudice the fair resolution of the others by the jury. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). In addition to accumulation of evidence, Mr. Williams would suffer prejudice by the refusal to sever where evidence admissible on one count – here the set of counts as to E.W., or as to M.W. -- was inadmissible on the other. Under Kalakosky, these are key factors for assessing severance along with the court's normal instructions to the jury directing it to decide each count separately. CP 94 (State's response to motion to sever, at pp. 17-18); State v. Kalakosky, supra, 121 Wn.2d at 537.

These considerations required severance. Mr. Williams emphasized that the aggregation of evidence was

> particularly problematic in the instant case to the extent that the alleged offense conduct involving the different complainants occurred during completely separate periods of time.. . . [T]he alleged offense conduct as to E.W. occurred between 1999 and 2003 [but] the alleged offense conduct as to M.W. occurred between 2006 and 2007.

CP 61 (Defense severance memorandum, at page 5).

Below, although the State contended that the charged counts could be easily compartmentalized, the State described the case in its briefing in a manner that showed the *need* for severance. First, the State recognized that the sets of counts charged as to E.W. and M.W. were many months apart. CP 94. The prosecution recognized that the evidence as to each set of counts was different in the levels of specificity and detail, and noted that the case as to M.W. also uniquely included disclosures made to a child friend, bolstering her allegation compared to the E.W. counts. CP 94. The State also acknowledged the defense arguments that E.W.'s proof was significantly different and less strong, including because E.W. actually denied the alleged conduct when interviewed by CPS. CP 94. These basic facts of the case militated in favor of severance.

Further, as Mr. Williams argued, the defendant would be prejudiced by a single trial on all of the counts, in the circumstances of this sex abuse case. CP 58. Joinder is particularly prejudicial in sex cases. State v. Saltarelli, 98 Wash.2d 358, 655 P.2d 697 (1982) (risk of prejudice from other alleged acts is highest in sex cases).

The State compared the case to State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992), a sex abuse prosecution in which a trial court had not abused its discretion in denying severance. CP 96. However, in that case, both child complainants had been left in the care of the defendant, who took the children driving with them in the front seat, and committed acts there. Here, M.W. and E.W. were not present during the span of acts, and Markle also involved overlapping charging periods for some crimes committed not only at the same place, but also at the same time. State v. Markle, 118 Wn.2d at 439. Markle is unlike the present case.

d. ER 404(b) – no on the record ruling. Importantly, however, the trial court gave no substantive, on the record ruling on the crucial issue of cross-admissibility, and ER 404(b).

The prosecutor did state that the evidence of the counts as to each child was cross-admissible under ER 404(b) because the girls "related similar instances of abuse." CP 94. The prosecutor also contended that the facts were intertwined, because E.W.'s disclosure occurred during the course of investigation of M.W.'s allegations. CP 94.

Additionally, of course, the prosecutor correctly noted that certain other witnesses would be the same in any separate (multi-count) trials, including the CPS personnel who interviewed M.W. and E.W., while they were living in one of the residences they occupied during the charging periods. CP 94.

It is true that a possibility of propensity reasoning will not be held, as a matter of law, as demonstrating by itself the undue prejudice that requires severance rather than a joint trial. Bythrow, 114 Wn.2d at 720. However, the trial court failed to conduct an on the record, substantive cross-admissibility analsyis that would have expressly set out the evidence's particular relevance and probity on a non-propensity matter, if any. Mr. Williams can point to specific prejudice.

e. Mr. Williams pointed to specific prejudice. Mr. Williams pointed to "specific prejudice." A criminal defendant can meet his burden on a severance motion if he can show that specific prejudice will result from a single trial. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968).

As to ER 404(b), except for later stating it was adopting the State's severance briefing, the trial court at the various motion hearings did not substantially address Mr. Williams'

argument that the issue of ER 404(b) cross-admissibility needed to be resolved before ruling on severance. 4/8/14RP at 110.

In applying ER 404(b), a trial court must determine the non-propensity purpose for which the evidence is offered, and its relevance to that purpose, and balance the probative value of the evidence against its prejudicial effect. State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995). In addition, the ER 403 assessment of probative value of evidence against its prejudicial effect must be part of the record. State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984).

At oral argument in opposition to severance, the prosecutor referred to its briefing and simply stated, "Most, if not all of the facts relating to one victim would, I believe, come in as to the other." 4/8/14RP at 110. The State merely argued that the girls "related similar instances of abuse," including ones in which a camera was discussed or used. CP 95.

This does not meet the threshold for "common scheme or plan." See State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003) ("common scheme," requires the other act and the charged crime must be "naturally explained as individual

manifestations of a general plan."). This was what defense counsel argued. CP 58 (Defense motion to sever, at p. 2 (citing cases)).

In contrast, Mr. Williams specifically argued that the sets of counts did not meet any of the specific requirements of any exceptions to ER 404(b). CP 59. For counts to be cross-admissible in a joint trial, they must both pass muster, each as to the other, under the applicable rules of evidence. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). But the trial court did not conduct an ER 404(b) analysis, including all of its steps on the record. State v. Campbell, 78 Wn. App. at 821; State v. Jackson, 102 Wn.2d at 694; see State v. Lough, 125 Wn.2d at 853 (determining steps). This must be done on the record. State v. Gogolin, 45 Wn. App. 640, 645–46, 727 P.2d 683 (1986).

As the defense argued below, the case was like State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), a severance case where the State argued the allegations would be properly admissible against the others to show intent, and absence of mistake or accident, several recognized non-propensity purposes. Ramirez, 46 Wn. App. at 227; see CP 60, 4/8/14RP

at 109-10. There**,** the defendant faced two counts of indecent liberties with two minor victims. Ramirez, 46 Wn. App. at 227. It was deemed error to deny severance where the two offenses were not admissible against each other under these claimed exceptions, and it was held that a joined trial would not promote a fair determination of guilt, under CrR 4.4(b). Ramirez, 46 Wn. App. at 228.

In this case, no adequate showing of cross-admissibility under an ER 404(b) exception was made out, either under common scheme, intent/absence of mistake, or much less *modus operandi*. See Watkins, supra, at 271-72 (other counts would not be admissible to show *modus operandi* or even absence of mistake. See also State v. Kilgore, 147 Wn.2d 288, 291–92, 53 P.3d 974 (2002) (appellate review hampered by lack of on-record analysis).

f. Reversal is required. In general, in sex abuse cases, evidence of other acts is highly prejudicial. In this case, in closing argument, on rebuttal, the prosecutor told the jury that there were differences in the statements that the girls, (who testified as adult witnesses), had made about their allegations, but the two girls accounts corroborated each other. 10/29/14RP

at 683-84. The prosecutor had been critiquing the defense theory, arguing that defense expert Dr. Yuille could only say that the multiple interviews and contested hearings affected the memory of the complainants. 10/29/14RP at 683-84. The State noted that the defense did not have to prove anything, but argued:

> But in this case you have information from the two victims about what had happened to them on a number of occasions and you don't have anything that says that didn't happen.

10/29/14RP at 683-84. Then, the prosecutor recounted the facts of the children's descriptions of the alleged abuse, 10/29/14RP at 683-88, and added:

> But in this case, you have girls that have difficulty remembering things, but they are not inconsistent with each other. They describe similar actions in similar ways in similar places from the same man, Frederick Williams. They are consistent with each other. They are practically parallel and that should tell you, one, no way did Officer Landis, without using any of those terms or any of those statements, not even knowing about them, convince both girls that that was what happened to them over years and years and years before, and, two, that it happened.

10/29/14RP at 683-89. In this manner, although the prosecutor did also tell the jury to consider each charge separately, the prosecutor took advantage of the trial court's disposition on the

severance issue, which was not supported by on-the-record analysis under ER 404(b) and ER 403.

The prejudice caused by the joined trial was therefore great. In the like case of State v. Harris, 36 Wn. App. 746, 752, 677 P.2d 202 (1984), the Court of Appeals held that where evidence of one count would not be admissible in a separate trial on the other count, denial of severance was error where the prosecutor, in closing argument, used the incidents to argue it would have to be implausibly “coincidental” that the defendant had been accused of two rapes in the case’s time span. Harris, 36 Wn. App. at 752. In Harris, the Court determined that a new trial was necessary "[i]n light of the actual prejudice to defendants." Harris, 36 Wn. App. at 752.

Ultimately, similar considerations of prejudice in Mr. Williams’ case warrant reversal of the denial the motions to sever. The same concerns of cross-contamination by accumulation of evidence, and also prohibited ER 404(b) propensity reasoning, that CrR 4.4(b) addresses, required the severance motion be granted. Gatalski, 40 Wn. App. at 607; Kalakosky, 121 Wn. 2d at 537. This Court should reverse Mr. Williams’ convictions.

(3). DISCOVERY WAS REQUIRED WITHOUT LIMITATION, AND ALTERNATIVELY, MR. WILLIAMS' DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT ENTITLED HIS COUNSEL TO PARTICIPATE IN THE COURT'S *IN CAMERA* REVIEW OF THE SCHOOL RECORDS.

a. No standing. During litigation of the childrens' Blaine school records issue, the prosecutor several times indicated it was unsure of its standing to object to production of the records. 12/19/13RP at 12 (prosecutor noting State had no ability to accept service of Mr. Williams' service of the notice to the E.W. and M.W. of the school records request).

Mr. Williams argues that the prosecutor did not have standing, and that he was therefore entitled to full discovery of the school records. Although the State was the party plaintiff in Mr. Williams' prosecution, the doctrine of standing bars a litigant from raising another's legal rights. Haberman v. WPPSS, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987). For example, the lawyer-client privilege against examination of a witness upon matters of confidential communication is personal to the client and cannot be asserted by a third party. State v. Vandenberg, 19 Wn. App. 182, 188, 575 P.2d 254, 257 (1978) (citing State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953)). Because the

prosecutor represents the State, and not the complainants in a criminal case, the prosecutor had no standing to assert any privilege of E.W. or M.W., thus full discovery was required under the court rules and the trial court should not have ordered only *in camera* review.

b. No Privilege. A party is not entitled to discovery of information from privileged sources. CR 26(b)(1), CrR 4.8; Soter v. Cowles Pub. Co., 162 Wn.2d 716, 745, 174 P.3d 60 (2007). The scope of discovery of privileged records is within the discretion of the trial court, but there must be a privilege covering the materials. See, e.g., State v. Mines, 35 Wn. App. 932, 938, 671 P.2d 273 (1983) (discovery of medical records under RCW 5.60.060(4), court's orders regarding limits of discovery subject to abuse of discretion review).

In the present case, the State did not adequately show that a particular privilege applied to the Blaine school records in the first instance. No privilege protected the Blaine school records of E.W. and M.W. from being subject to discovery including under CrR 4.7 and 4.8. RCW 18.19.060 makes "confidential" the communications between a person and a social worker, therapist, and other counselors, not school

records. The Federal Educational Records Privacy Act also does not create a privilege for purposes of discovery of school records. See Gonzaga Univ. v. Doe, 536 U.S. 273, 287, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).

> FERPA is not a law which absolutely prohibits the disclosure of educational records; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records. Thus, while FERPA was intended to prevent schools from adopting a policy or engaging in a practice of releasing educational records, it does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure.

Bialik v. Huber, 2013 WL 1499041 (W.D. Mich. Apr. 10, 2013). Additionally, E.W. and M.W.'s protections of privilege do not apply where the person with the privilege has no reasonable expectation that the communications would be confidential. A person may not claim a

> privilege as to communications that do not originate in the confidence that they will not be disclosed.

Hertog v. City of Seattle, 88 Wn. App. 41, 47-48, 943 P.2d 1153, 1156 (1997), aff'd sub nom. Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn. 2d 265, 979 P.2d 400 (1999). Mr. Williams was entitled to full discovery of the Blaine school records.

The trial court granted Mr. Williams' motion for a subpoena *duces tecum* seeking the two complainants' (E.W. and M.W.'s) Blaine school records, but subject to *in camera* review. The records were not provided to counsel but should have been.

In the alternative, however, the defendant's counsel – having the "advocate's eye" to know what might be useful for the defense or might lead to such evidence -- should have been entitled to participate in the trial court's *in camera* review of the records, under the restrictions of the defense's proposed protective orders.

c. <u>Arguments for discovery and participation in *in camera* review</u>. Mr. Williams sought discovery of the Blaine school records because they likely contained information about discussions the children had with CPS workers who came to the school, and statements relevant to the children's credibility. Supp. CP ___, Sub # 183 (Motion for issuance of subpoena *duces tecum*, Sept 9, 2013), Supp. CP ___, Sub # 182 (Affidavit

of defendant's counsel in support thereof); 12/19/13RP at 3; CrR 4.7, CrR 4.8.[4]

Following additional briefing, and further argument, on March 11, 2014, the trial court granted the subpoena *duces tecum* for the Blaine school records, but also held they would be subject to an *in camera* review. 1/9/14RP at 4-12, 2/18/14RP at 38-42, 3/11/14RP at 43-56, and p. 53. The court stated

> I will be looking for information that is discoverable, generally speaking, or could lead, could assist you with your investigation of him and assist you in tracking down other discoverable information[.]

3/11/14RP at 53. After the court's receipt of the records, Mr. Williams' counsel sought to participate in the trial court's *in camera* review. On May 6, 2014, the trial court denied the defense motion to have defense counsel, even "in a controlled environment" that would serve as a protective order, participate in the court's *in camera* review of the records. 5/6/14RP at 118-23; see Supp. CP ___, Sub # 234 (Defense memorandum in support of motion to participate in review).

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[4] Two transcripts have been requested from the court reporters on August 17, 2015; appellant supplementally designate these transcripts. On October 3, 2013, regarding the subpoena for the records, the State indicated it would provide contact information or serve the subpoena, and give notice to individuals. See Supp. CP ___, Sub # 186 (minutes of October 3). On October 9, Mr. Williams argued regarding discovery issues and obtaining records. See Supp. CP ___, Sub # 187 (minutes of October 9).

After reviewing the records *in camera*, the trial court stated they included simply educational assessments and that there was not anything potentially helpful to the defense. 5/6/14RP at 118-122. The records were preserved for the appellate record as stated in the superior court docket. 5/6/14RP at 118.

d. The trial court violated Mr. Williams' Due Process rights under the Fourteenth Amendment. Mr. Williams' counsel was entitled to participate in the *in camera* review. His right to review of the evidence was proper under the discovery rules, and protected by the 14th Amendment's Due Process clause. Importantly here, the intricacies of what might be material to Mr. Williams' defense was a complex factual question involving defense strategies, and important facts. Only actual participation by counsel could protect Mr. Williams' rights. Zaal v. State, 326 Md. 54, 54-76, 602 A.2d 1247, 1247-58 (1992); see United States v. Spires, 3 F.3d 1234, 1238–39 (9th Cir.1993); U.S. Const. amend. 14.

(i) Discovery. A defendant is entitled to substantial discovery in order to prepare his defense. Criminal Rules (CrR) 4.7 and 4.8 outline the right to discovery, including

where documents or records are held by others. Determining the scope of discovery is an issue vested in the discretion of the trial court. State v. Jones, 96 Wn. App. 369, 375, 979 P.2d 898 (1999). However, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249, 254 (2007). Whether constitutional rights were violated is a question of law that the appellate courts review *de novo*. State v. Elmore, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004), aff'd, 155 Wn.2d 758, 123 P.3d 72 (2005).

(ii) Fourteenth Amendment. An accused person has the right under the Due Process clause of the 14th Amendment to disclosure of evidence that is material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 55-58, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This includes impeachment, and potentially exculpatory as well as exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); U.S. Const. amend. 14.

e. Participation in *in camera* review would have protected the accused's interests and was required under Due Process. To be "material" for purposes of the Pennsylvania v. Ritchie standard supra, evidence must be admissible, and evidence must be relevant. State v. Knutson, 121 Wn.2d 766, 773-74, 854 P.2d 617 (1993). However, "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Thus in Zaal v. State, the Maryland Court addressed Pennsylvania v. Ritchie, and held that in contrast to the rape and sex abuse State records being sought in that case, in Zaal, the defense was seeking educational records of the victims. Zaal v. State, 602 A.2d at 1247-58, 1263. Due Process required the trial court consider *in camera* review with the participation of defense counsel, the only person that could provide what the Court termed the "advocate's eye," and determine for themselves what material in the records was relevant, given the other evidence in the case and the defense strategies or theories of the case. Zaal v. State, 602 A.2d at 1253.

Here, the school records sought were similarly less private than counseling records or state sexual abuse records, protected by statute. 3/11/14RP at 46-47 and 52-53. The defendant's Due Process rights to a fair trial required that defense counsel participate in the *in camera* review. Counsel would have the best ability to protect his client's rights, and the need to review the records was high.

This was not a fishing expedition. Mr. Williams specified that, based on information received from family and law enforcement, it was likely there were records from the Blaine schools that impeached the complainants' veracity in the school setting, and records regarding the interviews conducted by Child Protective Services (CPS) personnel at the school. 1/9/14RP at 8-12, 3/11/14RP at 43-53; Supp. CP ___, Sub # 182 (affidavit in support of subpoena *duces tecum*); Supp. CP ___, Sub # 219, at page 2 (second declaration in support of subpoena *duces tecum*).

Additionally, the issue of what factual matters might be "material" to Mr. Williams' case was a complex question involving various defense strategies. This was a case where the various choices for impeachment, and theories of impeachment,

each came with negative aspects. For example, based on Dr. John Yuille's testimony, part of the defense was that repeated discussions of alleged incidents had effectively created false memories in the complainant(s). See 10/28/14RP at 401, 417-24. Further, whether the Blaine school records contained material relevant to susceptibility to false memory was not the sole reason counsel needed to review the records with the court. Within the meaning of "material" to a defense, any evidence affecting the general credibility of government witnesses is certainly material, and this includes both conflicting statements, and general credibility. United States v. Alvarez, 348 F.3d 1194, 1208 (9th Cir. 2004); see Knutson, 121 Wn.2d at 775 (stressing the importance of impeachment evidence "in sexual assault cases where the complaining witness and the accused are the only witnesses.").

Importantly, protective orders would have ensured against review of the records by others, including the defendant. In arguing his initial motions for the Blaine school records, counsel noted that the defense would agree to any appropriate protective order crafted by the trial court that would prevent the dissemination or review of the records by others, "including the

defendant other than his counsel." (Emphasis added.) Supp. CP ___, Sub # 182, at p. 2 (affidavit in support of subpoena *duces tecum*). The trial court failed to consider the availability of protective orders.

f. Remedy. Mr. Williams asks this Court to reverse the trial judge's decision regarding discovery, and remand for further proceedings. See State v. Fuentes, 179 Wn. 2d 808, 822, 318 P.3d 257 (2014).

(4). THE BENCH FINDINGS THAT MR. WILLIAMS HAD A PRIOR CONVICTION THAT MADE HIM A PERSISTENT OFFENDER VIOLATED HIS RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

a. Sentencing; bench finding only. Washington adopted the POAA, commonly known as the "three strikes law," by initiative in 1993. State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514 (1996); abrogated on other grounds by Blakely v. Washington, 542 U.S. 296 (2004), infra. The POAA imposes a mandatory term of life imprisonment without the possibility of release for defendants who qualify as "persistent offenders." RCW 9.94A.570. "Persistent offenders" are those who have been convicted of at least three "most serious offense[s]." Former RCW 9.94A.030(32)(a)(i)-(ii) (2004). In 1996, the

legislature expanded the reach of the POAA by adding a "two strikes" provision. Laws of 1996, ch. 289, § 1. Under the "two strikes" option, a defendant qualifies as a "persistent offender" if convicted of at least two enumerated sex offenses. Former RCW 9.94A.030(32)(b)(i)-(ii) (2004).

At sentencing in this case, the trial court, without reliance on a jury finding of a prior qualifying conviction, deemed Mr. Williams a "two-strikes" persistent offender as a result of his prior conviction in 1991 for rape of a child. 12/11/14RP at 702, 708-09. The imposition of the sentence based on the bench finding was over the objection of defense counsel. 12/11/14RP at 702-03.

b. <u>The sentence violated Mr. Williams' Due Process and jury trial rights</u>. The objection was well-taken. The Due Process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A criminal defendant has the right to a jury trial and may only be convicted and punished if the government proves every element or fact necessary to that sanction beyond a reasonable doubt.

Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 2160-62, 186 L.Ed.2d 314 (2013); Blakely v. Washington, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The Supreme Court has recognized that this principle applies to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant, or the mandatory minimum. Alleyne, 133 S.Ct. 2161-62; Blakely, 542 U.S. at 304. The Blakely decision held that an exceptional sentence imposed under Washington's SRA was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, at 304-05; see Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury had not found the aggravating factors).

In Apprendi v. New Jersey, 530 U.S. 466, 492-93, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court found a statute unconstitutional because it permitted the trial court to give a sentence above the statutory maximum after making a factual finding by merely a preponderance of the evidence. Then in Alleyne, the Supreme Court ruled that the facts underlying the

imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that "the principle applied in Apprendi applies with equal force to facts increasing the mandatory minimum." 133 S.Ct. 2160.

And the Supreme Court has also recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. Southern Union Co. v. United States, ___ U.S. ___, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In the foregoing cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. Alleyne, 133 S.Ct. at 2162-63; Blakely, 542 U.S. at 304-05.

In Washington, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be

charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Where the prior conviction is an element of the crime rather than aggravating factors, the Roswell reasoning would dictate that the so-called prior conviction 'exception' to the rules in Apprendi and Almendariz-Torres does not apply. See Roswell, at 193 n.5. Therefore, under Alleyne, Blakely, Apprendi, together with Roswell, the judicial finding of Mr. Williams's prior conviction and the finding that he qualified as a persistent offender violated his right to Due Process and his right to a jury trial. His sentence under the POAA must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Frederick Williams respectfully requests that this Court reverse the judgment of the trial court.

DATED this 27th day of August, 2015.

Respectfully submitted,

/s/_____
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